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KARAMBUNAI CORP BHD & ORS

v.

AG DAMIT AG TENGAH

B

HIGH COURT SABAH & SARAWAK
RAVINTHRAN PARAMAGURU J
[CIVIL SUIT NO: K-22-249-2009]
21 OCTOBER 2013

C ***CIVIL PROCEDURE:*** *Judgments and orders - Setting aside - Orders issued by Syariah Court - Whether in excess of jurisdiction - Whether may be set aside by civil High Court - Federal Constitution art. 121(1A)*

D ***CIVIL PROCEDURE:*** *Jurisdiction - Jurisdiction of Syariah Court - Disputes over land ownership - Syariah Court Enactment 2004 of Sabah (No. 6 of 2004) - Whether within jurisdiction of Syariah Court*

E ***CONSTITUTIONAL LAW:*** *Courts - Jurisdiction - Conflict of jurisdiction between High Court and Syariah Court - Orders issued by Syariah Court - Whether in excess of jurisdiction - Whether may be set aside by civil High Court - Federal Constitution art. 121(1A)*

F ***LAND LAW:*** *Ownership - Claim for - Ownership claim over land made in Syariah Court - Non-Muslim parties involved - Whether orders made by Syariah Court valid - Whether orders of Syariah Court may be set aside by civil High Court - Whether issue of ownership of land could be determined by civil High Court*

G The dispute which arose in the present case concerned a large parcel of land known as the Karambunai land in Tuaran. The well-known holiday and golfing resort called Nexus Resorts and Spa which is run by the second plaintiff is located on the said land. The complaint of the plaintiffs was that the defendant had surreptitiously interfered with their registered interest in the land by obtaining various *ex parte* orders from the Syariah Court. By the time of trial, the Syariah Court of Appeal had set aside the said orders. The defendant was also alleged to have improperly applied for a replacement title from the Assistant Collector of Land ('ACLR'). The order of the ACLR was set aside by the Director of Lands and Surveys by the time of trial. Nonetheless, the plaintiffs were praying for declarations to the effect that the

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Syariah Court orders did not bind them. The plaintiffs claimed they were unaware of the defendant's purported interest in the Karambunai land or in the estate of Pg Siti Hapsah or Pg Siti Fatimah, who were the original owners of the Karambunai land. The plaintiffs had only dealt with the Pengiran brothers who were the registered owners of the Karambunai Land. However, from 2007 onwards, the defendant obtained a series of orders from the Syariah Courts to assert rights to the estate of Pg Siti Hapsah and the Karambunai land by listing the Karambunai land as an asset of the estate. In opposing the plaintiffs' claim, the defendant alleged that his act in obtaining the impugned orders was lawful and was not *mala fide*. The defendant further averred that the civil court had no jurisdiction to decide on the division and inheritance of a deceased Muslim as it fell within the jurisdiction of the Syariah Court. The issues that arose were *inter alia* (i) whether the Syariah courts have jurisdiction over persons professing the religion of Islam only; (ii) whether the law confers jurisdiction on the Syariah courts to nullify registered interests of a non-Muslim purchaser of property; (iii) whether the Syariah courts had acted in excess of jurisdiction.

Held (allowing claim with costs):

(1) The Syariah courts have jurisdiction over persons professing the religion of Islam only and their jurisdiction is limited to the matters stated in the State List of the Federal Constitution and in the Syariah Court Enactment 2004 of Sabah (No. 6 of 2004) ('the Enactment'). Disputes involving non-Muslims and disputes over land between a registered owner and a purported beneficial owner do not fall within the jurisdiction of the Syariah courts. In fact, s. 26 of the Enactment clearly provides that the Syariah courts have no jurisdiction over the rights or property of non-Muslims. (para 17)

(2) At the time the defendant applied to administer the estate of Pg Siti Hapsah and Pg Siti Alimah, the Karambunai land had already been vested in the Pengiran brothers and a large portion of it had been sold to the second plaintiff. Thus it did not form part of the estate of the said deceased persons. However, the Syariah Court had ordered the share of the second plaintiff in the Karambunai land to be transferred to the defendant. By virtue of the State List in the Federal

Constitution and the Enactment, the jurisdiction of the Syariah courts only extends to the appointment of administrator and division of property in respect of the estate of a deceased Muslim. Beyond that, nothing in the law confers jurisdiction on the Syariah courts to nullify the registered interests of a *bona fide* non-Muslim purchaser of property. The second plaintiff was a *bona fide* purchaser of the property. (para 19)

(3) The subject matter of litigation that was pursued in the Syariah courts by the defendant was not merely in respect of the administration and division of the estate of Muslim persons. It was unambiguously a dispute in respect of a competing interest between a non-Muslim registered owner and a beneficial owner in respect of land. This dispute clearly fell within the jurisdiction of the High Court alone. In the premises, the Syariah High Court and Syariah subordinate courts clearly acted in excess of jurisdiction insofar as the impugned orders affected the registered interest of the second plaintiff. (para 22)

(4) Article 121(1A) of the Federal Constitution would prevent the civil courts from granting any relief declaring Syariah court decisions as non-binding only if the Syariah court had acted within their jurisdiction. In the instant case, the Syariah courts which granted the impugned orders had even contravened their own incorporating Ordinance, *ie*, the Enactment. Section 26 clearly states that they are not empowered to grant orders that affect the property of a non-Muslim. Thus, the Syariah Courts had clearly acted in excess of jurisdiction. (para 25)

(5) The defendant was not entitled to pursue any remedies from the Syariah Court that interfered with the proprietary right of the plaintiffs in Karambunai land. (para 34)

Case(s) referred to:

Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd [1995] 3 CLJ 783 SC ***(refd)***

Majumder v. Attorney General of Sarawak [1966] 1 MLJ 41 ***(refd)***

Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed [1998] 2 CLJ 340 CA ***(refd)***

Siti Hasnah Vangarama Abdullah v. Tun Dr Mahathir Mohamad (As the President of Perkim) & Ors [2012] 7 CLJ 845 CA ***(refd)***

Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(refd)***
Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor [1999] 1 CLJ 481 CA ***(refd)***
Wong Sang Giap & Ors v. Wong Keng Giap & Ors [1999] 2 CLJ 618 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 23
Federal Constitution, art. 121(A)
Land Ordinance (Cap 68) (Sabah), s. 120
Penal Code, s. 377D
Syariah Courts Enactment 2004 (Sabah), ss. 4, 11(3)(b), 12(1)(b), 26

For the plaintiffs - Marina Tiu; M/s Yap Chin & Tiu
For the defendant - Sugumar Balakrishnan; M/s Sugumar & Co

Reported by Amutha Suppayah

JUDGMENT

Ravinthran Paramaguru J:

Introduction

[1] The dispute in this case concerns a large parcel of land comprised under Country Lease 045091174. It is also known as the Karambunai Land in Tuaran. The well known holiday and golfing resort called Nexus Resorts and Spa which is run by the second plaintiff is located on the said land. The complaint of the plaintiffs is that the defendant had surreptitiously interfered with their registered interest in the land by obtaining various *ex parte* orders from the Syariah Court. By the time of trial, the Syariah Court of Appeal had set aside the said orders. The defendant is also alleged to have improperly applied for a replacement title from the Assistant Collector of Land (ACLR) in the Tuaran. The order of the ACLR was set aside by the Director of Lands and Surveys by the time of trial. Nonetheless, the plaintiffs are praying for declarations to the effect that the Syariah Court orders do not bind them.

A **Case For The Plaintiff**

[2] The plaintiffs called two witnesses, ie, a registered valuer (PW1) and the former Chief Executive Officer (PW2) of the first plaintiff which is the holding company of the second plaintiff and
B the fifth plaintiff. PW1 gave evidence in respect of value of the properties that were affected by the Syariah Court orders and injunction obtained by the defendant. PW2 gave evidence in respect of the background of the Karambunai Land and actions of the defendant who allegedly had cast covetous eyes on the
C said land. The Karambunai Land was originally owned by Pg Siti Fatimah. She died in 1947. On 12 April 1956, by order of the Native Court of Jesselton, the Karambunai Land vested on her heirs, ie, Pg Siti Hapsah and Pg Siti Alimah Binte Datu Hussein. Upon the death of Pg Siti Alimah, her half share vested on Pg
D Othman bin Pg Mohd Yussof and his brother Pg Ahmad Shah Bin Mohd Yusoff (the Pengiran brothers). When Pg Siti Hapsah died on 1 August 1978, her half share in the Karambunai Land also vested on the Pengiran brothers. The second plaintiff purchased 600 acres of Karambunai Land and acquired a sublease of 2,735
E acres of Karambunai Land *via* two sale and purchase agreements with the Pengiran brothers on 20 February 1986 and 19 September 1991 respectively. The interests acquired *via* the sale and purchase agreement were registered on the title of the Karambunai Land. In 1994, the first plaintiff launched Nexus
F Resort and Spa project on the land. It was a huge investment and the project was launched by the then Prime Minister. PW2 said that the value of the Nexus Resort and Spa presently is about RM497 million. On 31 March 1995, the second plaintiff sold and transferred 1,835 acres of its sublease to the third plaintiff.
G Subsequently, the third plaintiff had on 24 August 1998 sold 335 acres of the sublease to the fourth plaintiff. On 3 October 2005, the second plaintiff had entered into a joint venture agreement with the fifth plaintiff for the development and marketing for a project known as Nexus Residence Karambunai. The plaintiffs
H continued to develop the Karambunai Land. PW2 said that the first plaintiff company and the Karambunai Land had been selected under the 2011 National Budget for the project EPP-5 which is expected to cost around RM6.5 billion with the Federal Government allocating RM100 million to part finance the project.

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[3] Up to this point of time, the plaintiffs were unaware of the defendant's purported interest in the Karambunai Land or in the estate of Pg Siti Hapsah or Pg Siti Fatimah. The plaintiffs had only dealt with the Pengiran brothers who were the registered owners of the Karambunai Land. However, from 2007 onwards, the defendant obtained a series of orders from the Syariah Courts to assert rights to the estate of Pg Siti Hapsah and the Karambunai Land as well. This is because the defendant had listed the Karambunai Land as an asset of the estate. The defendant had even obtained a consequential order from the Syariah Court by way of *ex parte* application for the production of the Karambunai Land title from the chargee bank without any notice to the registered owner. The defendant had also obtained a widely worded *ex parte* injunction from the Syariah Court to prevent the plaintiffs from dealing with the Karambunai Land. Only on 31 March 2008, the plaintiffs became aware of the claims of the defendant on the Karambunai Land and the estate of Siti Hapsah and Siti Fatimah when they received a notis panggilan addressed to DBS Bank Ltd, Labuan Branch and the defendant. The notice was issued by the Deputy Director of the Lands and surveys department. DBS Bank Ltd was issued with the said notice because they are the chargee of the Karambunai Land and were in possession of the title. The plaintiffs then discovered that the defendant had obtained a series of orders from the Syariah Subordinate Court and Syariah High Court which not only granted the defendant the right to administer the estate of Siti Hapsah but also recognised the Karambunai Land as an asset of the estate. The intention of the defendant to stake a proprietary claim on the Karambunai Land was crystal clear as he had obtained an *ex parte* injunction from the Syariah Court to compel the chargee (DBS Bank) to surrender the title. The plaintiffs are now praying for declarations to nullify the effect of the Syariah Court orders (the impugned orders in prayer (1) of the statement of claim). The impugned orders are as follows:

(a) Perintah Deklarasi made on 6 March 2008 under Kes Mal No. 12100-099-0070 TAHUN 2008;

(b) Perintah Pembahagian Harta/Tanah Pusaka made on the 6 March 2008 under Kes Mal No. 12100-040-0067 Tahun 2008;

(c) Perintah made on the 24 April 2009 under Kes Mal No. 12100-034-0254 Tahun 2008 and Kes Mal 12100-040-0067 Tahun 2008; and/or

(d) Perintah made on the 26 August 2009 under Permohonan No. 12100-005-5-0457 Tahun 2009 which granted an *ex parte* injunction against *inter alia*, the second, third and fourth plaintiffs.

[4] Apart from the above orders, the defendant had earlier obtained similar orders from the Syariah Subordinate Court dated 11 February 2008 and 14 February 2007. The above orders were set aside by the Syariah High Court on 13 December 2011.

Case For The Defendant

[5] The defendant was the only witness on his behalf. He said he obtained three orders from the Syariah High Court, ie, Perintah Pembahagian Harta/Tanah Pusaka under Kes Mal No. 12100-040-0067 Tahun 2008 dated 6 March 2008, Perintah Deklarasi under Kes Mal No. 12100-040-0070 Tahun 2008 dated 6 March 2008 and an *ex parte* injunction order under Permohonan No. 12100-005-2009. He had applied for the above orders as the administrator and successor to the estate of Pg Siti Hapsah pursuant to the order dated 14 February 2007 by the Mahkamah Rendah Syariah Pantai Barat at Kota Kinabalu. He believed that his act in obtaining the impugned orders was lawful as the order of the Mahkamah Rendah Syariah Pantai Barat dated 14 February 2007 was only set aside by the Syariah High Court on 13 December 2011. He denied that he was actuated by *mala fides* as suggested by the plaintiffs. He said the impugned orders were obtained in good faith in the course of the administration of the estate of Pg Siti Hapsah. He said when he lodged a caveat on the Karambunai Land, he was still the lawful administrator pursuant to the order of the Mahkamah Rendah Syariah Pantai Barat dated 14 February 2007. He lodged another two caveats pursuant to the *ex parte* injunction order granted by the Syariah High Court. He had no knowledge of the whereabouts of the original title deed at that time and that is the reason he applied for replacement copy under s. 120 of the Sabah Land Ordinance (Cap 68). He said that the two Syariah High Court orders dated 6 March 2008 and the injunction order were set aside by the

Syariah Court of Appeal. He said that the Syariah Court of Appeal ordered a retrial of the action (Kes Mal No. 12100-040-0067). The Syariah Court of Appeal further ordered the two Pengiran brothers, the Amanah Raya Berhad, the second plaintiff and others having an interest in the case to appear at the retrial. He said the instant claim is *res judicata* because the impugned orders had been set aside and that the plaintiffs are attempting to circumvent the decision of the Syariah Court of Appeal. He said he is the lawful beneficiary of the estate of Pg Siti Hapsah and that the civil court has no jurisdiction to decide on the division and inheritance of a deceased Muslim as it falls within the jurisdiction of the Syariah Court. He said that he was not a party to previous proceedings between the plaintiffs and the Pengiran brothers in respect the Karambunai Land. Finally, the defendant challenged the right of the Pengiran brothers to succeed to the estate of Pg Siti Hapsah.

Issues

[6] The parties did not submit agreed issues to be tried. Counsel for plaintiff submitted the following broad issues for the determination of the court:

1. Whether the Syariah Courts have jurisdiction to invalidate the registered interests of the second plaintiff in determining the claim of the defendant to the estate of the Siti Hapsah and Siti Alimah?

2. Whether the plaintiffs are estopped from bringing the action herein on ground of *res judicata*?

5. Whether the defendant acted with *mala fide* in the Syariah Court actions?

6. Whether the plaintiffs are entitled to damages?

[7] Counsel for defendant submitted that the parties are at variance on the following issues:

(i) Whether the defendant had wrongfully applied and obtained the impugned orders from the Mahkamah Rendah Syariah Pantai Barat Kota Kinabalu and the Mahkamah Tinggi Syariah?

(ii) Whether the defendant had wrongfully applied and obtained an order from the Tuaran ACLR for a replacement copy of the land title of the said subject land?

(iii) Whether the Mahkamah Rendah Syariah Pantai Barat Kota Kinabalu and the Mahkamah Tinggi Syariah had jurisdiction to grant the impugned orders in favour of the defendant?

(iv) Whether the defendant in applying and obtaining the impugned orders from Mahkamah Rendah Syariah Pantai Barat Kota Kinabalu, Mahkamah Tinggi Syariah and the Tuaran ACLR had acted *mala fide*?

(v) Whether the defendant suffered any damages consequent to the defendant applying and obtaining the impugned orders from Mahkamah Rendah Syariah Pantai Barat Kota Kinabalu, Mahkamah Tinggi Syariah and the Tuaran ACLR?

[8] To recapitulate, it is not disputed that the High Court made two orders on 18 April 1984 and 26 September 1991 which vested the shares of the Pg Siti Hapsah and Pg Siti Alimah in the Karambunai Land on the Pengiran brothers. In 1986 and 1991, the second plaintiff had purchased a large portion of the land for development of the Nexus Resorts and Spa from the Pengiran brothers and had registered their interests on the land title. From the 1994 onwards, the second plaintiff and other plaintiffs had expended a huge amount of money on the said project. In 2007, the defendant suddenly emerged and claimed a right to succeed to the estate of Pg Siti Hapsah and Pg Siti Alimah and obtained the impugned orders in question. By the time of the trial, all the orders have been set aside by the Syariah Court of Appeal and the Syariah High Court. The order of the ACLR of Tuaran directing the chargee bank to surrender the Karambunai Land title had also been set aside. However, the plaintiff has prayed for several declarations against the defendant in respect of the orders that he obtained from the Syariah Court. The sum of the declarations sought by the plaintiffs is that the Syariah Court orders and *ex parte* injunction insofar as it affects their registered interest in the Karambunai Land is not binding on them. Counsel for defendant submitted that this court precluded from granting the reliefs sought by the plaintiffs for the following reasons:

(i) The action is academic as all the said impugned orders had been set aside;

(ii) The action is *res judicata* as the issues raised herein were decided in the Syariah Courts;

(iii) This court has no power to consider a matter within the exclusive jurisdiction of the Syariah Court by virtue of art. 121(A) of the Federal Constitution.

[9] In my view, the above arguments constitute the main issues in the instant case and I shall consider them first before addressing other issues.

Whether Action Is Academic?

[10] Learned counsel for the defendant submitted that there is no live issue in respect of the remedies sought by the plaintiffs for the following reasons. He argued that since the impugned orders have been set aside by the Syariah Court of Appeal, the declaratory remedies sought by the plaintiffs have "no practical consequence" and are "academic". He further submitted that there is no dispute in existence between the parties. It is trite law that the court possess a discretion not to make a declaratory order on issues that have been rendered academic (see *Wong Sang Giap & Ors v. Wong Keng Giap & Ors* [1999] 2 CLJ 618; [1999] 1 MLJ 551 and *Majumder v. Attorney General of Sarawak* [1966] 1 MLJ 41). As outlined in the background facts, the defendant obtained orders from the Syariah Court which were not only in respect of the estate of Pg Siti Hapsah but also in respect of the Karambunai Land. In the Perintah Pembahagian Harta/Tanah Pusaka made by the Syariah Court on the 6 March 2008 under Kes Mal No. 12100-040-0067 Tahun 2008, the defendant obtained an order to nullify the registered interest of the plaintiffs in the Karambunai Land and obtained a consequential order directing the Lands and Surveys Department to register a half share of the land to him. The defendant also obtained an order directing the chargee (DBS Bank) to deliver the Karambunai Land title to the Land Office at Tuaran. Although all the relevant Syariah Court orders that impinged on registered interest of the plaintiffs in the Karambunai land had been set aside, in my opinion, the action is not academic. My reasons are as follows. It is common ground that the Syariah Court of Appeal had ordered a retrial of Kes Mal No. 12100-040-0067. As counsel for defendant submitted, this is the principal action before the Syariah Court. It must be noted

that the defendant obtained orders to nullify the registered interest of the plaintiffs in this action. The Syariah Court of Appeal had not only ordered a retrial but also ordered interested parties including the second plaintiff to appear at the trial. Although, the retrial of the said action has not commenced for more than two years since the date of the order of the Syariah Court of Appeal, there is a possibility that it may proceed as the action has not been withdrawn by the defendant. Counsel for plaintiffs also correctly submitted that there is ample evidence that the defendant has not stopped asserting his purported claim to the Karambunai Land by virtue of being the alleged heir to the estate of Pg Siti Hapsah and Pg Siti Fatimah. The defendant had been lodging caveats against the Karambunai Land since 2007. The latest caveat he lodged was in October of 2010 when he used the order of the Syariah Subordinate Court which appointed him as the administrator of the estate of Pg Siti Hapsah. The defendant had also, as recently as on 14 August 2012, approached the Brunei Probate Court to obtain letters of administration in respect of the estate of Pg Siti Hamidah who is the sister of Pg Siti Hapsah. In the premises, although the impugned Syariah Court orders had been set aside, the action by the plaintiffs to protect their registered interest in the Karambunai land cannot be deemed academic by any stretch of the imagination as the defendant has not abandoned his main action before the Syariah Court.

Res Judicata

[11] Counsel for defendant submitted the issues that were raised in paras. 14-22 of the statement of claim are *res judicata* because the second plaintiff was a party in the proceedings in the Syariah High Court and Syariah Court of Appeal when the impugned orders were set aside. Counsel for defendant then further argued that the second plaintiff was a proxy for the other defendants. Counsel for plaintiff cited the oft-quoted passage on the subject of *res judicata* from the judgment of Peh Swee Chin SCJ in *Asia Commercial Finance (M) Bhd v. Kawal Teliti Sdn Bhd* [1995] 3 CLJ 783; [1995] 3 MLJ 189 which is as follows:

> What is *res judicata*? It simply means a matter adjudged, and its significance lies in its effect of creating an estoppel *per rem judicatum*. When a matter between two parties has been adjudicated by a court of competent jurisdiction, the parties and their privies are not permitted to litigate once more the *res*

judicata, because the judgment becomes the truth between such parties, or in other words, the parties should accept it as the truth; *res judicata pro veritate accipitur*. The public policy of the law is that, it is in the public interest that there should be finality in litigation – *interest rei publicae ut sit finis litium*. It is only just that no one ought to be vexed twice for the same cause of action – *nemo debet bis vexari proeadem causa*. Both maxims are the rationales for the doctrine of *res judicata*, but the earlier maxim has the further elevated status of a question of public policy.

[12] Counsel for the plaintiff firstly submitted that the issue of the right of the defendant to the Karambunai Land was not finally adjudicated in the Syariah Courts. The reason is that all the orders of the Syariah Court that impinged on the right of the plaintiffs to the Karambunai Land had been set aside and retrial of the main action is pending. In the premises, counsel for plaintiff is correct in her submission that the issue that concerned the registered interest of the plaintiffs in the Karambunai Land had not been finally adjudicated by the Syariah Court. Even if the issue had been adjudicated by the Syariah Court, counsel for plaintiff submitted that the doctrine of *res judicata* can only be invoked in cases when a matter between two parties has been adjudicated by a court of competent jurisdiction. The argument canvassed by counsel for plaintiffs is that the Syariah Courts are not competent to adjudicate a dispute on the issue of priority between a registered owner of a land and a non-registered interested party such as the defendant. This is because only the Civil High Court is vested with jurisdiction to decide disputes concerning land. However, in order to fully consider this point, it is necessary to take into account the counter argument of counsel for defendant that the Civil High Court cannot interfere with the jurisdiction of the Syariah Courts. In support of this argument, counsel for defendant cited art. 121(1A) of the Federal Constitution. I shall therefore consider the jurisdictional issue next.

Jurisdiction Of Civil High Court And The Syariah Court Pertaining To Land Disputes

[13] Syariah Courts in Sabah are set up under s. 4 of the Syariah Courts Enactment 2004 of Sabah (No. 6 of 2004). Section 11(3)(b) of the said Enactment defines the civil jurisdiction of the Syariah High Court. It provides as follows:

(b) in its civil jurisdiction, hear and decide all actions and proceedings if all the parties to the actions or proceedings are Muslims and the actions or proceedings relate to:

A (i) betrothal, marriage, *ruju'*, divorce, annulment of marriage (*fasakh*), *nusyuz*, or judicial separation (*faraq*) or any other matter relating to the relationship between husband and wife;

B (ii) any disposition of or claim to property arising out of any of the matters set out in sub-para. (i);

(iii) the maintenance of dependants, legitimacy, or guardianship or custody (*hadhanah*) of infants;

C (iv) the division of, or claims to, harta sepencarian;

(v) wills or gifts made while in a state of *marad-al-maut* of a Muslim deceased;

(vi) gifts *inter vivos* (*hibah*), or settlements made without adequate consideration in money or money's worth by a
D Muslim;

(vii) *wakaf* or *nazr* or matters relating thereto;

(viii) **division and inheritance of testate or intestate property or appointment of Wasi and for matters**
E **relating thereto**;

(ix) *the determination of the persons entitled to share in the estate of a deceased Muslim or the shares to which such persons are respectively entitled and for matters relating thereto*;

F (x) a declaration that a deceased person was a Muslim or otherwise at the time of his death;

(xi) registration and adoption of child and for matters relating thereto; and

G (xii) other matters in respect of which jurisdiction is conferred by any written law.
(emphasis added)

[14] Section 12(1)(b) of the said Enactment limits the civil
H jurisdiction of the Syariah Subordinate Court to:

(b) in its civil jurisdiction, hear and decide all such actions and proceedings as a Syariah High Court is authorised to hear and decide, if the amount or value of the subject-matter in dispute does not exceed one hundred thousand ringgit or is not
I capable of estimation in terms of moneys (not including claims of *hadhanah* or harta sepencarian).

[15] The jurisdiction of the Syariah Courts as provided in the above Enactment is consistent with the para. 1 of the State List (List II) in the Federal Constitution provides that the State Legislature may make laws only pertaining to:

> ... the constitution, organisation and procedure of Syariah Courts, which shall have **jurisdiction only over persons professing the religion of Islam** and in respect only of any of the matters included in this paragraph ... (emphasis added)

[16] The matters provided in para. 1 include:

> Islamic law and personal and family law of persons professing the religion of Islam, including the Islamic law relating to **succession, testate and intestate**, betrothal, marriage, divorce, dower, maintenance, adoption, legitimacy, guardianship, gifts, partitions and non-charitable trusts; ... (emphasis added)

[17] It is clear from the above provisions that the Syariah Courts have jurisdiction over persons professing the religion of Islam only and their jurisdiction is limited to the matters stated in the State List and in the Syariah Court Enactment 2004 (No.6 of 2004). Disputes involving non-Muslims and disputes over land between a registered owner and a purported beneficial owner do not fall within the jurisdiction of the Syariah Courts. In fact, s. 26 of the Syariah Courts Enactment 2004 of Sabah (No. 6 of 2004) clearly provides that the Syariah Courts have no jurisdiction over the rights or property of non-Muslims. Section 26 reads as follows:

> Jurisdiction does not extend to non-Muslims
>
> 26. **No decision** of the Syariah Appeal Court, Syariah High Court or any of the Syariah Subordinate Court **shall involve the right or the property of a non-Muslim**. (emphasis added)

[18] The Civil High Court on the other hand has the sole jurisdiction to adjudicate on all land disputes between any party, whether Muslim or non-Muslim. Section 23 of the Courts of Judicature Act 1964 provides as follows:

> (1) Subject to the limitations contained in Article 128 of the Constitution the High 25 Court shall have jurisdiction to try all civil proceedings where:
>
> (a)-(c)

A (d) **any land the ownership of which is disputed is situated,**

within the local jurisdiction of the Court and notwithstanding anything contained in this section in any case where all parties consent in writing within the local jurisdiction of the other High
B Court.

[19] The Schedule to the Courts of Judicature Act 1964 also provides that any dispute in respect of partition of land or sale of land falls within the jurisdiction of the Civil High Court. In the
C premises, it is clear that land disputes are within the jurisdiction of the Civil High Court alone and do not fall within the jurisdiction of the Syariah Courts. The Syariah Courts only have jurisdiction in respect of the succession of estates of deceased persons. There is no doubt that property of a deceased person
D may include land and this property could properly be listed as forming part of the estate of a deceased person. However, in the instant case, at the time the defendant applied to administer the estate of the Pg Siti Hapsah and Pg Siti Alimah, the Karambunai Land had already been vested in the Pengiran brothers and a large
E portion of it had been sold to the second plaintiff. Thus it did not form part of the estate of the said deceased persons. However, the Syariah Court had ordered the share of the second plaintiff in the Karambunai Land to be transferred to the defendant. By virtue of the State List in the Federal Constitution and the Syariah
F Court Enactment 2004 (No. 6 of 2004), the jurisdiction of the Syariah Courts only extends to the appointment of administrator and division of property in respect of the estate of a deceased Muslim. Beyond that, nothing in the law confers jurisdiction on the Syariah Courts to nullify the registered interests of a *bona fide*
G non-Muslim purchaser of property. There is undisputed evidence that the second plaintiff is a *bona fide* purchaser of the property. The agreements through which the second plaintiff acquired part of the Karambunai Land were exhibited in court. At the material time, the Pengiran brothers were the registered owners of the
H Karambunai Land. The defendant himself admitted during cross-examination that the second plaintiff was a *bona fide* purchaser. Article 121(1A) of the Federal Constitution which counsel for defendant relied on to argue that the Civil High Court cannot grant any relief pertaining to the Syariah Court action of the
I defendant reads as follows:

(1a) The courts referred to in cl. (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah Courts.

[20] "The Court" in the above clause refers to the Civil High Courts established under art. 121. However, before this clause can be invoked to bar the Civil High Court from exercising jurisdiction in any matter, it must be demonstrated that the said matter falls within the jurisdiction of the Syariah Courts. It is clear from the List II and the Syariah Court Enactment 2004 (No. 6 of 2004) of Sabah that adjudication of disputes in respect of title to land do not fall within the jurisdiction of the Syariah Courts. Furthermore, as submitted by counsel for plaintiffs, "jurisdiction of the Syariah courts" should be read as "exclusive" jurisdiction. The authority that she cited is the Court of Appeal case of *Sukma Darmawan Sasmitaat Madja v. Ketua Pengarah Penjara Malaysia & Anor* [1999] 1 CLJ 481; [1999] 1 MLJ 266. The appellant was charged in the Sessions Court for an act of gross indecency which is an offence under s. 377D of the Penal Code. The facts supporting the Penal Code offence also disclosed an offence under the Syariah Criminal Offences (Federal Territories) Act 1997. It was argued by the appellant that only the Syariah Courts had jurisdiction over the appellant and the offence which the appellant is alleged to have committed. The Court of Appeal came to the conclusion that the expression 'jurisdiction of the Syariah Courts' refers to 'the exclusive jurisdiction' of those courts. Gopal Sri Ram JCA (as His Lordship then was) speaking for the Court of Appeal gave an example of exclusivity of jurisdiction which is as follows:

> In other words, if a person professing the religion of Islam does a proscribed act which is an offence both under the Penal Code (FMS Cap 45) and the Act, then the courts referred to in art. 121(1) will have jurisdiction to try such an offence. It is only in respect of offences under the Act that a Syariah court may have exclusive jurisdiction. For example, the offence of adultery which is prescribed as an offence under the Act has no equivalent in the Penal Code (FMS Cap 45) or other federal criminal statutes. So if a person professing the religion of Islam commits adultery, then he or she may be tried only in a Syariah Court.

[21] The appeal to the Federal Court from the Court of Appeal was dismissed and the above passage was cited with approval. In the more recent case of *Siti Hasnah Vangarama Abdullah v. Tun Dr Mahathir Mohamad (As the President of Perkim) & Ors* [2012] 7 CLJ 845, the Court of Appeal followed the above mentioned case. It held that:

> ... only if the subject-matter of the action is exclusively within the jurisdiction of the Syariah Courts would the subject-matter, by virtue of art. 121(1A), fall outside the jurisdiction of the civil courts.

[22] In the instant case, by the time the defendant approached the Syariah Court to claim the estate of Pg Siti Hapsah and Pg Siti Fatimah, the second plaintiff had acquired registered interest in the Karambunai Land and yet the defendant listed the Karambunai Land as an asset of the said deceased persons. Therefore, the subject matter of litigation that was pursued in the Syariah Courts by the defendant was not merely in respect of the administration and division of the estate of Muslim persons. It was unambiguously a dispute in respect of a competing interest between a non-Muslim registered owner and a beneficial owner in respect of land. For reasons given earlier, this dispute clearly falls within the jurisdiction of the High Court alone. In the premises, the Syariah High Court and Syariah Subordinate clearly acted in excess of jurisdiction insofar as the impugned orders affected the registered interest of the second plaintiff in the Karambunai Land.

Other Issues

[23] The plaintiffs also pleaded that the defendant abused the process of the court. Abuse of civil process is a distinct tort under common law. In *Malaysia Building Society Bhd v. Tan Sri General Ungku Nazaruddin Ungku Mohamed* [1998] 2 CLJ 340; [1998] 2 MLJ 425, the Court of Appeal listed the elements of the said tort as follows:

(i) The process complained of must have been initiated;

(ii) The purpose for initiating that process must be some purpose other than to obtain genuine redress which the process offers. In other words, the dominant purpose for which the process was invoked must be collateral, that is to say, aimed at producing a result not intended by the invocation of the process; and

(iii) The plaintiff must have suffered some damage or injury in consequence.

[24] The argument of counsel for plaintiffs is that the defendant acted with *mala fide* and had commenced the Syariah court proceedings in furtherance of his intention to wrongfully gain benefit. In my opinion, the fact that the defendant approached the Syariah Court to succeed to the estate of Pg Siti Hapsah and Pg Siti Fatimah and by extension, the Karambunai Land, is not sufficient for this court to hold that the defendant committed the

tort of abuse of civil process. My reasons are as follows. The defendant had applied for relief in the Syariah Courts. He is a Muslim and is therefore eligible to apply to succeed to the estate of Pg Siti Hapsah and Pg Siti Fatimah. The merits of this application are within the purview of the Syariah Court. However, the defendant had seen fit to include the Karambunai Land as an asset of the estate of the deceased persons although by that time, the second plaintiff had become the registered owner of part of the said land. In cases where a litigant brings a claim or prays for a remedy that is clearly outside the jurisdiction of the court, it is for the court to decline jurisdiction, refuse the remedy sought or strike out the action for abuse of civil process and award damages. Unfortunately, in the instant case, despite the crystal clear provisions of the Syariah Court Enactment 2004 on the limits of its jurisdiction (especially s. 26), the Syariah Courts granted a series of orders that nullified the registered interest of a non-Muslim in the Karambunai Land. However, I am not satisfied that the defendant had committed the tort of abuse of civil process before this court. The abuse of process, if any, was committed in the Syariah Courts. Therefore, it is for the Syariah courts to take cognizance of it and not the civil courts.

Whether Civil High Court Can Grant Remedy?

[25] The plaintiff has applied for a number of reliefs. The plaintiffs have applied for declarations that the impugned Syariah Court orders have no effect on the registered interest of the second plaintiff in the Karambunai Land. As I stated earlier, counsel for defendant submitted that the Civil High Court cannot give declaratory orders to the effect that the Syariah Court orders are not binding on the plaintiff as that would contravene art. 121(1A) of the Federal Constitution. In my opinion, art. 121(1A) would prevent the civil courts from granting any relief declaring Syariah Court decisions as non-binding only if the Syariah Court had acted within their jurisdiction. In the instant case, the Syariah Courts which granted the impugned orders had even contravened their own incorporating Ordinance, ie, the Syariah Court Enactment 2004 (No. 6 of 2004). Section 26 clearly states that they are not empowered to grant orders that affect the property of a non-Muslim. Thus, the Syariah Courts had clearly acted in excess of jurisdiction. The purpose of art. 121(1A) is to separate the jurisdiction of the Civil and Syariah Courts. Neither is allowed to

A interfere with each other's jurisdiction. The following passage from the judgment of the Federal Court in the case of *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1 which is a matrimonial matter involving conversion to the religion of Islam bear out this view:

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> Article 121(1A) of the FC makes a clear distinction between the jurisdiction of the Syariah and civil courts and, hence, with the separation of the jurisdiction, the respective courts cannot interfere with each other's jurisdiction. Thus, the civil court cannot be moved to injunct a validly obtained **order of a Syariah court of**
> C **competent jurisdiction**. (emphasis added)

[26] In the instant case, the defendant had applied for relief from the Syariah Courts that interfered with the registered property rights of a non-Muslim company under the guise of obtaining
D consequential orders in relation to the administration of the estate of a deceased Muslim. However, for reasons given earlier, it is indisputable that a Syariah Court is not a court of competent jurisdiction for the purpose of adjudicating a matter involving a land dispute, let alone a dispute over registered land that belongs
E to a non-Muslim. In my view, Civil Courts should not decline jurisdiction merely on the ground that the Syariah Court had made a decision on a matter which has an Islamic law element in it such as administration of an estate of a deceased Muslim and accept the argument that art. 121(1A) applies. There is no magic in the
F mere invocation of art. 121(1A). It is still the bounden duty of the court to inquire whether there is merit in the counter argument that art. 121(1A) does not apply. Otherwise, the act of declining jurisdiction mechanically would be tantamount to abdication of duty to protect the fundamental rights of a citizen. I find support
G for this view in the following passage from the case of *Siti Hasnah Vangarama Abdullah v. Tun Dr Mahathir Mohamad (As the President of Perkim)* [*supra*], where Hishamudin Mohd Yunus JCA who delivered the judgment of the Court of Appeal said as follows:

> H In conclusion, we wish to say that a civil High Court must be extremely cautious and slow in declining jurisdiction and in coming to the conclusion that the subject-matter of an action before it falls within the exclusive jurisdiction of the Syariah Courts; particularly,

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in cases involving the fundamental rights of the subjects. In *Abdul Ghani Haroon v. Ketua Polis Negara & Another Application (No 3)* [2001] 2 CLJ 709; [2001] 25 2 MLJ 689 it has been said (at p. 697):

> Judges are the protectors of fundamental liberties of the subjects as enshrined in the Constitution. It is a sacred trust that they must vigilantly uphold.

[27] I shall now consider whether it is proper to grant relief in the form prayed for by the plaintiffs.

Reliefs

[28] In this case, all the impugned orders have already been set aside. Therefore a declaration to nullify the said orders may be academic, but the action itself is not academic for reasons given earlier. In the premises, the plaintiffs are entitled to a declaration to protect their registered interest in the Karambunai Land from being extinguished by the defendant under the guise of pursuing a claim to administer the estate of a deceased Muslim. I shall first rule on the prayers sought by the plaintiffs. Prayers (1) to (5) of the statement of claim are as follows:

(i) A declaration that the following orders obtained by the defendant in the Syariah High Court were improperly and/or wrongfully obtained and/or made and therefore invalid and not binding and/or not binding on the plaintiffs or any of them:

(a) Perintah Deklarasi made on 6 March 2008 under Kes Mal No. 12100-099-0070 Tahun 2008;

(b) Perintah Pembahagian Harta/Tanah Pusaka made on the 6 March 2008 under Kes Mal No. 12100-040-0067 Tahun 2008;

(c) Perintah made on the 24 April 2009 under Kes Mal No. 12100-034-0254 Tahun 2008 and Kes Mal No. 12100-040-0067 Tahun 2008; and/or

(d) Perintah made on the 26 August 2009 under Permohonan NO. 12100-005-0457 Tahun 2009 which granted an *ex parte* injunction against *inter alia*, the second, third and fourth plaintiffs.

(2) Further and/or alternatively, a declaration that Syariah High Court do not and did not at all material times have the jurisdiction to make the Perintah Deklarasi made on 6 March 2008 under Kes Mal No. 12100-099-0070 Tahun 2008, the Perintah Pembahagian Harta/Tanah Pusaka made on the 6 March 2008 under Kes Mal No. 12100-040-0067 Tahun 2008, the Perintah made on 24 April 2009 under Kes Mal No. 12100-034-0254 Tahun 2008 and Kes Mal No. 12100-040-0067 Tahun 2008 and/or the Perintah made on the 26 August 2009 under Permohonan No. 12100-005-0457 Tahun 2009 respectively and therefore such orders are a nullity and of no binding effect.

(3) Further and/or alternatively, a declaration that Syariah High Court do not and did not at all material times have jurisdiction to enforce the Perintah Deklarasi made on the 6 March 2008 under Kes Mal No. 12100-099-0070 Tahun 2008 and/or the Perintah Pembahagian Harta/Tanah Pusaka made on the 6 March 2008 under Kes Mal No. 12100-040-0067 Tahun 2008 on or against the second, third and fourth plaintiffs or any of them and/or their respective rights, titles and interests in and over the said Country Lease 045091174 and/or to issue the *ex parte* injunction in the Perintah made on the 26 August 2009 under Permohonan No. 12100-005-0457 Tahun 2009 against the second, third and fourth plaintiffs or any of them.

(4) Further and/or alternatively, a declaration that the defendant is not entitled to enforce and/or is precluded from enforcing the Perintah Deklarasi made on the 6 March 2008 under Kes Mal No. 12100-099-0070 Tahun 2008 and/or the Perintah Pembahagian Harta/Tanah Pusaka made on the 6 March 2008 under Kes Mal No. 12100-040-0067 Tahun 2008 on or against the second, third and fourth plaintiffs or any of them and/or their respective rights, titles and interests in and over the said Country Lease 045091174 and/or to issue the *ex parte* injunction in the Perintah made on the 26 March 2009 under Permohonan No. 12100-005-0457 Tahun 2009 against the second, third and fourth plaintiffs or any of them.

(5) Further and/or alternatively, a declaration that the orders made by the Syariah High Court, namely:

(a) the Perintah Deklarasi made on the 6 March 2008 under Kes Mal No. 12100-099-0070 Tahun 2008;

(b) the Perintah Pembahagian Harta/Tanah Pusaka made on the 6 March 2008 under Kes Mal No. 12100-040-0067 Tahun 2008; and/or

(c) the Perintah made on the 24 April 2009 under Kes Mal No. 12100-034-0254 Tahun 2008 and Kes Mal No. 12100-040-0067 Tahun 2008 respectively; do not in any event and in any way affect, diminish, invalidate or extinguish the respective rights, titles and interests of the second, third and fourth plaintiffs in and over the said country lease 045091174.

[29] In my opinion, prayers (1), (2), (3) (4) and (5) are academic because the impugned orders have been set aside. The alternative prayer, ie, prayer (6) is as follows:

(6) Further and/or alternatively, a declaration that notwithstanding the outcome of any dispute between the defendant and Ag (now Pengiran) Ahmad Shah bin Pg Yusof and Ag (now Pengiran) Othman Shah bin Pg Yusof over the succession to the Estate of Pangiran Siti Hapsah Binti Pengiran Mohd Salleh, deceased:

(a) the second, third and fourth plaintiffs' respective rights, titles and interests in and over the said country lease 045091174 are and remain valid and subsisting without diminution; and

(b) the second, third and fourth plaintiffs' respective rights, titles and interests in and over the said country lease 045091174 are binding on the said Ag Ahmad Shah bin Pg Yusof and Ag Othman Shah bin Pg Yusof and/or the said defendant and take priority over the defendant's alleged claim or interest in and to the said country lease 045091174 and/or over any other subsequent claim or claims thereto; and/or

(c) the defendant is estopped from denying the second, third and/or fourth plaintiffs' respective rights, titles and interests in and over the said country lease 045091174 and from denying that such rights, titles and interests are binding on him and take priority over his claim and interest in the said country lease 045091174.

[30] In order to give effect to the above alternative prayer, the plaintiffs also applied for the following consequential reliefs:

(7) And for the following consequential orders or relief:

(a) An injunction against the defendant whether by himself or by his servants or agents or otherwise whomsoever from in any way howsoever and whensoever interfering with and disturbing the peaceful and quiet enjoyment of the plaintiffs or any of them of their respective rights, titles and interests in and over the said country lease no. 045091174 and/or in any way whatsoever impeding, frustrating and/or creating or causing difficulties to the plaintiffs or any of them in their use, occupation and development of and/or their dealings on and in respect of the said country lease 045091174;

(b) An injunction against the defendant whether by himself or by his servants or agents or otherwise in any way howsoever and whatsoever from executing or applying to execute the Perintah Pembahagian Harta/Tanah Pusaka made on the 6 March 2008, the Perintah made on the 24 April 2009 and the *ex parte* injunction obtained on the 26 August 2009 under Permohonan No. 12100-005-0457 Tahun 2009;

(c) An injunction against the defendant whether by himself or by his servants or agents or otherwise in any way howsoever and whatsoever and whether directly or indirectly from denying or denouncing the second, third and fourth plaintiffs' rights, titles and interests in and over the said country lease 045091174;

[31] Prayer (6) is for declaration that notwithstanding the outcome of the pending trial in the Syariah Court in respect of the dispute between the defendant and the Pengiran brothers, the plaintiffs' rights over the Karambunai Land take priority and remain valid and subsisting. In my opinion, prayer (6) should not be allowed as it purports to grant a final remedy to the plaintiffs in respect of the priority dispute over the Karambunai Land. It is granted that the second plaintiff is the registered owner of part of the Karambunai Land and the defendant had interfered with their proprietary right by obtaining the impugned orders in a forum that

is not vested with jurisdiction to adjudicate the dispute. However, the defendant did not file a counterclaim in the instant suit asserting that he has a prior claim over the Karambunai Land. The plaintiffs' case was that the Syariah Courts have no jurisdiction to determine a priority dispute over the Karambunai Land. In the premises, the priority dispute does not fall for determination in this suit. However, the plaintiffs are entitled to prevent the defendant from seeking any future relief from the Syariah Courts that interferes with their proprietary rights. I shall address the relief that I shall grant in the concluding paragraph of this judgment.

Damages

[32] The plaintiffs have sought damages of RM9 million that were allegedly caused by the action of the defendant in obtaining the impugned orders. In my opinion, the plaintiffs are not entitled to pursue the claim for damages before the Civil High Court. My reasons are as follows. I have already ruled that the plaintiffs cannot pursue a cause of action for abuse of civil process as the tort, if any, was committed before the Syariah Courts. In respect of the injunction obtained in the Syariah Court, I take note there is an undertaking to give damages in the Syariah Court injunction order very much like undertakings given in Civil Courts when *ex parte* injunctions are applied for. Paragraph 11 of the Syariah High Court *ex parte* injunction order reads as follows:

> 11. Pemohon hendaklah berakuijanji untuk menanggung apa-apa kos atau ganti rugi yang akan ditaksirkan kepada mana-mana pihak sekiranya keputusan yang diputuskan oleh Mahkamah diasaskan ke atas Fakta yang tidak benar; ...

[33] The application to review and set aside the impugned orders before the Syariah Court of Appeal was made by the second plaintiff. In the premises, the damages against the defendant for obtaining the impugned orders and the *ex parte* injunction to nullify the proprietary right of the plaintiffs should have been applied for before the Syariah Court of Appeal and not the Civil High Court. I shall therefore make no order in respect of damages.

Conclusion

[34] As the plaintiffs' registered interest in the Karambunai Land is still being threatened by the machinations of the defendant, I shall grant the following relief. I shall grant a declaration that

having regard to Syariah Court Ordinance 2004 (No. 6 of 2004) particularly s. 11 and s. 26, the defendant is not entitled to pursue any remedies from the Syariah Court that interferes with the proprietary right of the plaintiffs in Karambunai land and that he is also barred and injuncted from so doing. Although the above relief was not specifically prayed for, it ought to be granted under the prayer (g) 'for any other relief as the court deems fit and proper'. I shall also grant costs of RM50,000 in favour of the plaintiffs.